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## How Right are Economic and Social Rights?

The interaction between law and economics in human rights

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*Zuerst kommt das Fressen und dann die Moral*

*(B. Brecht)*

### Introduction\*

Law and economics increasingly find themselves discussing the same issues. In recent years, for example, institutional economics has become an important field of study. A central theme in the discussion is the economic consequences of property rights, which are distinguished as the right to use an asset, the right to earn an income from it and the right to transfer ownership rights to another owner<sup>1</sup>. Economists relate property rights to the use of scarce resources. In the field of Soviet studies, disciplines have always found it difficult not to overstep the narrow boundaries of their own expertise; studies on the economics of the Soviet system always included the importance of state ownership of the means of production, whereas law studies could not get around the fact that an enormous amount of law in the Soviet system concerned economic issues.

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<sup>1</sup>. Thrainn Eggertsson, *Economic Behavior and Institutions*, Cambridge, 1990, pp. 34-35

Being a jurist at heart, but with a self-proclaimed love of statistics<sup>2</sup>, Ger van den Berg has often stepped into field of economics. He has published several contributions in which he brings together a wealth of statistical information, gathered from a wide variety of sources<sup>3</sup>. In personal discussions, I am sorry to observe that Ger often expresses strong scepticism and sometimes even outright disdain for the workers in my profession (I am an economist), whom he often accuses of an unwarranted faith in poor statistics as well as giving poor advice to the reformers in Russia. Since Ger's knowledge of Soviet and Russian statistics is probably second to none, I am not arguing his accusation of ignorance. With respect to the other accusations I must disagree and I shall attempt to use this contribution to set the economists' record straight.

However, the editors, in their invitation, indicated that they would like to make human rights the topic of this collection. This field, however, has very much been the domain of law, and economics, to the best of my knowledge, has not yet ventured widely into it. But with the increasing number of human right treaties - there are now 12 under the auspices of the United Nations, and I refer especially the International Covenant of Economic, Social and Cultural Rights (ICESCR) - economists are at least drawn into the field of human rights.

In my contribution I would like to develop a few thoughts on the extension of human rights to include economic rights. My comments will focus on the difficulties, from an economic point of view, that will arise if economic rights were given the same status as the individual's right to recognition everywhere as a person before the law, protection from arbitrary arrest, detention of exile and many others. Developments in the Soviet Union and Russia will be used to illustrate my arguments.

## **Declarations**

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<sup>2</sup> . Ger van den Berg, Resources against judgements in civil and criminal cases in the Russian Federation, in: Roger Clark, Ferdinand Feldbrugge and Stanislaw Pomorski (eds.) International and National Law in Russia and Eastern Europe. Essays in Honour of George Ginsburgs, Dordrecht, 2001, p. 19

<sup>3</sup> . Van den Berg, Ger, The Soviet System of Justice: Figures and Policy, Dordrecht, 1985. Ger van den Berg, Quantitative Aspects of the Stalinist System of Justice and Terror in the Soviet Union, in: Feldbrugge, F.J.M. (ed.) The Distinctiveness of Soviet Law, Dordrecht, 1987

The Universal Declaration of Human Rights (UDHR) dates back to 1948 and consists of an impressive set of rights and member states pledge themselves to achieve, in co-operation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms<sup>4</sup>. Even if it had done nothing else, the UDHR has certainly served as a catalyst for policies to improve the human rights situation in most countries of the world. The UN started to draft conventions which would be legally binding on the states that would ratify them. In 1952, the General Assembly, at the initiative of Western states, decided to divide the rights contained in the UDHR into two separate international covenants, one on civil and political rights (ICCPR) and the other on economic, social and cultural rights<sup>5</sup>. By 2002, 150 states had signed the ICESCR, and 143 had ratified it. The United States is one of the countries that has not yet ratified the covenant. The numbers for the ICCPR are 148 and 142 respectively, with China as one among those not yet having ratified the covenant<sup>6</sup>. The split into two separate covenants agreed with the two separate state groupings that existed during the time of the Cold War and that dominated the international political agenda. The Western states were willing to create an international court or committee of human rights for the purpose of implementation, but were unwilling to extend the jurisdiction of such a court or committee to include economic, social and cultural rights. The Soviet states on the other hand stressed the importance of just those economic, social and cultural rights<sup>7</sup> (Craven, 2001:456). Craven points out that the major difference between the approaches of the two blocs were in the interpretation of the term 'implementation'. The Western countries stressed the importance of international supervision or enforcement and the mobilisation of shame, whereas the Soviet type states emphasised the importance of active, national, realisation where international institutions would encourage the provision of assistance and foster co-operation, but would not pass judgement over

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<sup>4</sup> . UDHR, preamble

<sup>5</sup> . Asbjorn Eide and Allan Rosas, Economic, Social and Cultural Rights: A Universal Challenge, in: Eide, Asbjorn, Catarina Krause and Allan Rosas (eds), Economic, Social and Cultural Rights. A Textbook, Second Revised Edition, Dordrecht, 2001, p. 3

<sup>6</sup> . United Nations, Status of Ratifications of the Principal International Human Rights Treaties as of 08 Jan 2002. UN Website

<sup>7</sup> . Matthew Craven, The UN Committee on Economic, Social and Cultural Rights, in: Eide, Asbjorn et. al. op.cit. note 5, p. 456

states<sup>8</sup>. Both covenants, therefore, differ in terms of obligation clauses and supervisory systems.

An underlying discussion on the separation of the sets of rights concerned the nature of the rights<sup>9</sup>. Civil and political rights are termed ‘first generation’ rights, relating to the eighteenth-century French Declaration on the Rights of Man, while economic, social and cultural rights are ‘second generation’ rights, that sprang from the socialist ideals in the nineteenth and twentieth century. Civil and political rights would be concerned with individual autonomy and freedom, whereas economic, social and cultural rights are not derived from this ‘natural law’ pedigree. Furthermore, economic, social and political rights would lack the characteristics of universality and absoluteness to be proper human rights. The economic, social and cultural rights are not ascribed to an individual by virtue of their humanity, but as a result of their position or role in society. They are embodied in moral ideals which cannot be immediately realised. If someone would not receive them, that would not be a grave affront to justice.

A more profane reason to distinguish between the two sets of rights relates to the state obligations accruing from them. They have to respect, protect and fulfil these rights<sup>10</sup>. States have to take steps, individually and through international assistance and co-operation, to the maximum of their available resources. This brings the matter of human rights in the direct domain of economics, namely the allocation of scarce resources. Of course, it is a matter of discussion and continuous evaluation what the state can and cannot guarantee in terms of human rights (or other rights for that matter) and what resources can be made available by the state for those purposes. Especially the advocates of giving economic, social and cultural rights the same status as civil and political rights point out that neither in the principles, nor in the financial consequences there is a great difference between the separate sets of human rights<sup>11</sup>. They all cost money. However, from an economic point of view it makes a big difference whether money is spent by the state, for instance to build and operate a legal system and for everyone to have equal access to, and treatment by the law, or

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<sup>8</sup> . Matthew Craven, op.cit. note 7, p. 456-457

<sup>9</sup> . Matthew Craven, *The International Covenant on Economic, Social and Cultural Rights. A perspective on its development*, Oxford, 1995, pp. 6-16

<sup>10</sup> . Asbjorn Eide, *Economic, Social and Cultural Rights as Human Rights* in: Asbjorn Eide et al. op.cit. note 5, pp. 23

that money is passing through the state, for instance to provide those without an income with some means of existence. In the first case, the state uses the money for its own expenditure, while in the latter case the state merely redistributes income from one individual to another. The first generation human rights fall in the first category, while many (although not all) of the economic, social and cultural rights fall into the second category. We shall return to these points later on.

### **State Obligations and the Cold War**

The role of the state in economic processes has always been an important issue in the economic debate. The inspirators of both the market economy, Adam Smith, and the centrally planned economy, Karl Marx, gave a prominent position to the role of the state in the economy. Smith argued that states should not intervene in markets to ensure that individual agents were freely able to realise their self-interest and in doing so would realise the maximum welfare for all. Marx focused on the unequal relationship between workers and capitalists. According to him, workers had no option but to sell their labour to, and be exploited by, capitalists. The state, in Marx' view, was instrumental in maintaining the unequal relationships, and, in order to free labour, it was important to seize state power. Once the workers would seize it, the state would lose its class character and would subsequently wither away. Both Smith and Marx essentially argued in favour of a minimal state to realise freedom for the people and to make sure there was no unfair distribution of income. They differed in their evaluation of private property. To Marx this was the quintessence of capitalism, where workers had nothing to sell but their labour power. Marx linked economic freedom to political freedom, a discussion that has continued into the 20<sup>th</sup> century when, inspired by his writing, Soviet communism, nationalised all means of production and claimed that the state had become neutral and exploitation had become a thing of the past.

The economic, social and cultural rights are described in articles 22 to 27 of the UDHR. Without being exhaustive, they include the right to work, to free choice of employment, to protection against unemployment, to equal pay for equal work, to just and favourable remuneration for everyone who works, to enjoy an existence worthy

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<sup>11</sup> . See Matthew Craven, *op.cit.* 7 and *op.cit.* note 9 for a discussion.

of human dignity, to join and to form trade unions, to rest and leisure, including limitation of working hours and periodic holidays with pay, to a standard of living adequate for the health and well-being of himself and of his/her family, including food, housing and medical care, to security in the event of unemployment, sickness, disability, widowhood, old age or the lack of livelihood beyond his/her control, to education, to participate in the cultural life of the community. Education shall be free in the elementary and fundamental stages. In the elementary stages education should be compulsory. The ICESCR takes these articles to build a set of articles to which states that sign the covenant will hold themselves. These states oblige themselves to undertake steps, individually and through international assistance and co-operation, especially economical and technical, to progressively achieve to the maximum of their available resources the full realisation of the rights recognised in the covenant.

In this respect, it is quite understandable that Soviet-type regimes stressed the importance of these rights, as they had included many of these rights in their constitutions and actually had the instruments to realise them. Article 14 of the 1977 Constitution of the Soviet Union cited Marx' notion from the Critique to the Programme of Gotha, "From each according to its ability, to each according to his work" as the principle of socialism<sup>12</sup>. It described labour, free from exploitation, as the source of growth and stated that a person's status in society depended on socially useful work and its results. It also stated that the state helped to transform labour into the prime vital need of every Soviet citizen<sup>13</sup>. As the supreme goal, the 1977 Constitution defined the fullest possible satisfaction of people's growing material, cultural and intellectual requirements (art. 15). The Soviet Constitution guaranteed Soviet citizens continuous improvement of their living standards (art. 39) and steady growth of the productive forces (art. 40). This article also guaranteed the right to work. The rights to rest and leisure, health protection, to maintenance in old age, or in sickness and in the event of complete or partial disability or loss of the breadwinner, to housing and to education were laid down in articles 41 to 45. These articles included provisions about how these rights were ensured. The right to work was ensured by the socialist economic system, steady growth of the productive forces and

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<sup>12</sup> . Constitution of the Union of Soviet Socialist Republics, Moscow, 1977

<sup>13</sup> . The 1977 Constitution is a softer version of the 1936 Constitution which made work a duty and a matter of honour for every able citizen according to the principle: He who does not work, shall not eat (art. 12)

so on; the right to leisure was ensured by the establishment of a working week not exceeding 41 hours, with the option of shorter working days in a number of trades and industries; the right to health protection was secured by free, qualified medical health care provided by state health institutions among others; the right to maintenance was ensured by social insurance of workers and other employees and collective farmers etc.; the right to housing was ensured by the development and upkeep of state and socially-owned housing among others; and the right to education was ensured by free provision of all forms of education.

The Soviet state took full responsibility for all these rights and could be held responsible for compliance as the foundation of the economic system of the Soviet Union was socialist ownership of the means of production in the form of state property (belonging to all the people), and collective farm and co-operative property (art. 10). Western states lacked this full ownership of the means of production and depended on private economic actors to provide employment and economic growth and to pay sufficient income into the state budget for the responsibilities that the state was willing to take on, at least financially, such as free provision of education, certain level of health protection, and housing projects. The state, however, could not direct the means of production into a preferred direction. Western states, to a great extent, could only indirectly influence production, and had to take the reactions of economic agents into account. An example of this can be found in the economic literature that discusses the optimal level of taxes. If economic actors perceive tax levels as being too high, they may engage in illegal or semi-legal tax evasion, or they may choose to remain inactive rather than 'work for the tax office'. This will reduce the tax revenues of the state, and, to increase these revenues, the state is best advised to lower, rather than increase, taxes.

The Soviet experience of socialist ownership and the concomitant centrally planned character of the economy showed the difficulties of realising economic growth in order to ensure an increasing standard of living. Growth in the Soviet Union had been high in the nineteen thirties and early fifties, but had been deteriorating ever since<sup>14</sup>. After the break-up of the Soviet Union, the economic situation in Russia and the other successor states proved to be even much worse than was feared in very bleak scenario's. The actual functioning of the centrally planned economy was very

different from the way it was planned to function<sup>15</sup>. This had very much to do with the fact that economic actors in the Soviet Union also responded to state actions in a way that frustrated the state's stated intentions. People engaged in informal and illegal activities and reduced their working time, frustrating the growth targets<sup>16</sup>.

### **State Obligations After the Cold War**

With the transition from a centrally planned economy to a market economy, Russia, in 1993, also adopted a new Constitution<sup>17</sup>. It established private ownership and the right to make free use of this property for entrepreneurial activities and other activities not prohibited by law (art. 34). It abandoned guaranteed employment, but proclaimed that labour is free and that everybody has the right to freely make use of his ability to work and to choose the type of activity and occupation. Neither does the new Constitution mention a right to economic growth. The Constitution still contains articles on the right to rest and leisure, social security, housing, health protection and medical assistance, and education (art. 37-41). But with the exception of medical assistance that shall be provided to citizens free of charge out of the resources of the appropriate budget and other receipts, and the pre-school, basic general and secondary vocational education, that shall be guaranteed free of charge, the Constitution no longer indicates ways of ensuring these rights. The end of the Cold War has changed the focus of the debate on human rights. The West, with its focus on civil and political rights, no longer opposed the Soviet states, with their emphasis on economic, social and cultural rights. The demise of the communist systems gave rise to a certain extent of triumphalism in the West, which had proven to be not only superior in political and civil rights, but also in economic and social rights. The economies of the western countries produced much more income and the material welfare of their populations was much higher than that of those living in Eastern Europe. The countries in Eastern Europe very rapidly adopted western style constitutions and, more importantly,

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<sup>14</sup> . See Alec Nove, *An Economic History of the U.S.S.R.*, New Edition, Harmondsworth, 1994 for a discussion of statistics with respect to the Soviet Union

<sup>15</sup> . See, among others, Ed Hewett, *Reforming the Soviet Economy*, Washington, 1988, Janos Kornai, *Economics of Shortage*, Vol. A and B, Amsterdam, 1980, and Alec Nove, *op.cit.* note 12

<sup>16</sup> . Joop de Kort, *Interactions Between the Planner, Managers and Workers in Centrally Planned Economies*, Amsterdam, 1994

<sup>17</sup> . Constitution of the Russian Federation, 1994



adopted political systems which guaranteed freedom of speech and freedom of party formation. Taken out of the context of the Cold War, the discussion on the ICESCR returned to the issues of primary and secondary rights as discussed above<sup>18</sup>. A concise presentation of the black and white position can already be found in Van Hoof<sup>19</sup>. He presented and discussed three arguments in favour of a clear distinction between the types of rights. The realisation of the economic, social and cultural rights requires a financial effort on the part of the state, while this is not the case with civil and political rights. Furthermore, the former require active intervention by the state, whereas the latter require non-participation on the part of the state. Finally, civil and political rights are minimum rights that cannot vary from country to country, while economic, social and cultural rights have a variable content depending on the level of economic development in a particular country<sup>20</sup>. Van Hoof points out that implementation of civil and political rights also requires a financial effort of the state and that in poor countries this can be a heavy burden on the budget. He furthermore points out that certain civil and political rights, such as the right to a fair trial, do demand an active intervention of the state, whereas the freedom to form trade unions, an economic and social right, asks for an abstinent state. With respect to the third issue, he points to court practice with respect to the invariable contents of civil and political rights.

### **The importance of income distribution**

Acknowledging that the borders between the types of rights are difficult to draw and can be redrawn at any time, there is a strong economic case for not approaching economic and social rights in the same way as civic and political rights. Van Hoof, and others, in arguing in favour of an integral approach, are too quick in lumping all the financial consequences of all human rights together. They fail to recognise certain important economic distinctions in these financial consequences, which, I think, do justify a separation. They include the different roles of the state in the economy, the claims that may accrue from granting economic and social rights and the fact that

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<sup>18</sup> . See Asbjorn Eide, op.cit. note 5 and Matthew Craven, op.cit. note 7

<sup>19</sup> . G. van Hoof, The Legal Nature of Economic, Social and Cultural Rights: A Rebuttal of Some Traditional Views, in: Alston, P. and K. Tomasevski (eds), The Right to Food, Dordrecht, 1984

minimum standards of economic and social rights depend very much on the level of economic development.

The comparison of Soviet-type systems with Western systems made it clear that it was impossible for western states to intervene directly in the distribution of the means of production, whereas Soviet-type states could do exactly that. Basing the economic order on private property fundamentally changes the position of the state. It will no longer be responsible for the production of all goods and services and it will have to raise the means to finance the production of its own output through taxes and dues. In this situation too, it has to be an explicit choice what exactly will be provided by the state. In almost every state, Western states included, the legal system, which defines the rights and obligations of citizens with respect to one another and between the state and its citizens, in principle is a state responsibility. To state this in a rather crude way, the state produces law and order, which is consumed by all citizens. This production adds value to the economy and thus enters the national income equation as government expenditures. The state should not exclude anyone from the consumption of this good. The production of this good is paid for by tax payers, but everyone, paying or not paying, enjoys the benefits of its production. The civil and political rights as described in the UDHR and the ICCPR fall in the domain of law and order, they define state obligations with respect to individual citizens. It is the rights themselves that are produced and consumed.

To realise economic and social rights it is insufficient to produce and consume (enforce) rules and regulations. To realise an adequate standard of living for everyone, as written in art. 25 of the UDHR and artt. 11-12 of the ICESCR in an economic system that is based on the private ownership of the means of production, the state may need to redistribute goods and services from those that are well-off to those that are falling below the line that describes an adequate standard of living. This redistribution of production does not add value and therefore does not show up in the national income equation. It appeals to principles of solidarity within a country and those who pay into this solidarity can only benefit (directly) from it in the future, but may never have to rely on it at all. The protection that is offered by means of solidarity, however, can also be achieved by private insurance. This is an important reason why in most countries income distribution is a very sensitive political issue

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<sup>20</sup> . G. van Hoof, op.cit. note 17, pp. 102-105

that lies at the heart of politics and is subject to ongoing debate. Countries may differ widely on the level of solidarity that they are willing to provide. Furthermore, countries may differ widely on the definition of the minimum requirements for a decent standard of living. This will vary from country to country depending on economic and cultural differences. The minimum requirements are a socially determined minimum. In some (of the richer) countries this may include household appliances, electronic equipment, a minimal personal, heated, housing space of 50 square meters and a car, whereas in other (often poorer) countries it may suffice to offer a roof and a minimum amount of calorie intake. But even between countries with similar income levels there may be large differences with respect to the minimum requirements. This complicates the determination of what exactly are the rights to which individual citizens are entitled. It is very difficult to establish a universal equal standard for economic and social rights.

Another issue arises with respect to the financial burden that may fall upon the state when we compare the enforcement of civil and political rights on the one hand and economic and social rights on the other. With respect to civil and political rights as defined in the UDHR and ICCPR, the costs of law and order can be limited. Since these rights define the relationship between the state and its citizens, the state can minimise the costs of the system by abiding by the rules itself. Citizens then have no reason to go to court and bring action against the state. Economic and social rights do not only define the relationship between (individual) citizens and the state, but also between individuals among one another, mediated by the state that transfers income from those with higher incomes to those with lower or no income. The costs of enforcing these rights not only depend on the level of solidarity that a society is willing to provide, but also on the number of people that depend on income redistribution. The costs, therefore, are rather unpredictable. If the economic situation in a country turns bad, for reasons within or outside the reach of national economic policy, many people may become dependent on solidarity to maintain an adequate standard of living. To finance the larger appeal on the system, the state has to increase taxes on the ever smaller group of people that finances the solidarity. This group then may want to change the rules. However, in a political system that relies on the principle of one-man-one-vote, a relatively small group of people finds it hard to change the rules. Rather, they may withdraw from the economy as described above, making it even more difficult to maintain the standard of living for all individuals.

Another difference between the two types of rights arises from the possible consequences that accepting them have on international obligations. Although states that sign and ratify both covenants primarily accept the obligation to realise these goals (or, in a milder form, accept the obligation to make efforts towards realising these goals) within their own jurisdiction, they also have to accept that other states form a judgement on their achievements. These other states may also act upon these judgements. The violation of civil and political rights in China for example has delayed its entrance in the World Trade Organisation and induced other states to impose trade boycotts on China. But the international community can only try to persuade the offending state to comply with the UDHR and the ICCPR. It cannot produce these rights in the violating country itself. The only thing the international community can do to relieve the problems of individuals in countries that see their rights violated is to offer these individuals asylum elsewhere.

The situation is different with respect to some of the economic and social rights. If one country violates the right to an adequate standard of living, it is possible, by means of an international transfer of income, that other countries provide for these rights. This opens up an entire array of difficult and politically sensitive questions that need to be dealt with. The different level of adequate standards of living mentioned above is only one of them, and may be one of the least controversial ones. The question whether or not the incumbent government can be held responsible for the violation is more difficult to answer. The circumstances for not satisfying the right to an adequate standard of living may or may not be within the realm of the state. Governments of poor countries hardly have the means to guarantee a decent income to all their citizens. There is no point in taking steps against these governments. It would even be unfair, since non-compliance is beyond their control. Another difficult issue concerns the effectiveness of an income transfer. Will this support really benefit those in need, or will the additional income flow be used to siphon off domestic income elsewhere from the economy, with the result that the income transfer is one from rich countries to rich elites in poor countries. This is a very important issue, since, if an adequate standard of living is a right in itself, poor countries can claim support from wealthier countries and thus pass on the bill. An illustration of this is given in Spiliopoulou Akermark who discusses the relationship between Russia and

the IMF in the 1990s, when Russia needed foreign assistance<sup>21</sup>. It was the Russians who brought in human rights and democratic consolidation as an argument to receive assistance. The state budget supposedly was insufficient to guarantee the realisation of these rights. The Russians criticised the IMF for concentrating on the economic problems of interaction involving the stabilisation package. However, in the same period that the IMF granted loans to Russia for over 12 billion dollars, capital flight from Russia never was below 9 billion US dollars annually<sup>22</sup>. Finally, as indicated above, countries differ widely with respect to the level of solidarity that they are willing to offer even domestically. International solidarity is even more politically sensitive than national solidarity and, therefore, more difficult to organise. Whereas income transfers within countries can mount to around 30 per cent of national income, almost no country succeeds in transferring the internationally set goal of 0.8 per cent of national income to developing countries, where it could carry a lot of weight. The political sensitivity of economic and social rights may not extend to all the items included in those rights. The right to equal pay for equal work<sup>23</sup> or the right to form trade unions and to join trade unions<sup>24</sup> for example are much more in line with civil and political rights, that stress that everyone is equal and has a right to express himself. Therefore, these rights could be approached in a similar fashion. However, the rights that involve financial redistributions are politically very sensitive and countries differ greatly in their attitude towards them. A legalistic approach, trying to determine minimum standards and creating obligations, will most likely result in a race to the bottom. Countries will try to retain as much of their discretionary powers as possible and the result will be counterproductive with respect to creating the circumstances to ensure people a decent standard of living.

### **The realisation of economic, social and cultural rights**

Politically, the transfer of income to ensure an adequate standard of living may be a very sensitive issue, but economically there is an alternative to realise an adequate

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<sup>21</sup> . Sia Spiliopoulou Akermark, International Development Finance Institutions: The World Bank and the International Monetary Fund, in: Asbjorn Eide et al., op.cit. 5

<sup>22</sup> . Abalkin, A. and J. Whalley (eds.), The Problem of Capital Flight from Russia, The World Economy, Vol. 22, nr. 3, pp. 421-444, 1999

<sup>23</sup> . ICESCR, art. 7 (a, ii)

standard of living. It is found in economic growth that ensures a level of income that allows an adequate standard of living for everyone, without having to rely on too high a level of income distribution. This brings us back to the discussion which economic system, a planned economic system or a market economy, would be best to realise economic growth. In the late 20<sup>th</sup> century, the common position in economics has become favourable to markets as the best guarantee to realise economic growth. The Soviet type economic system of central planning has proven to be inefficient and ineffective in realising its claims on economic growth. The market economy, which presupposes private ownership of the means of production and the primacy of consumer preferences, is thought to be superior, in its capacity to distribute the means of production efficiently, over the Soviet-type economies characterised by state ownership and planner's preferences.

Although the common economic position may favour the market economy, there still are profound differences between market economies, in particular with respect to the role of the state in the economy and its consequences on the realisation of economic growth and development. This is an important subject in institutional economics and the conclusions of studies in this field are finding their way into economic policies, especially those policies that are concerned with aid to less developed countries. These findings stress the importance of well-defined (private and state) property rights and the emergence of what is called good governance, as conditions to realise economic growth. Good governance includes transparency, accountability as well as predictability of state actions. It also includes rules and regulations with respect to private enterprises. Economic actors prefer a well-defined and stable environment, which allow them to assess the risks they are taking in pursuing their interests. This contributes to high economic growth. Good governance is now entered as a condition to recipients of development aid. It is particularly important in programmes for debt relief to heavily indebted poor countries. It induces poor countries to strengthen the "ownership" of their economic strategies<sup>25</sup>. This does not mean that human rights issues should be left out of these programmes, but it is well understood that

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<sup>24</sup> . ICESCR, art. 8 (1, a)

<sup>25</sup> . Sergio Pereira Leite, The International Monetary Fund and Human Rights, *Le Monde*, September 4, 2001, also IMF website

sustainable growth and a stable macro-economic environment are by themselves supportive of human rights.

## **Conclusions**

The distinction between civil and political rights on the one hand and economic, social and cultural rights on the other hand has been an important point of contention in the discussion on human rights. In 1948, the General Assembly of the United Nations adopted and proclaimed the UDHR. Shortly after that, in 1952, it decided to divide the rights into two separate international covenants. It drew the discussion on human rights into the arena of the cold war, with western countries emphasising civil and political rights and Soviet-type countries stressing the importance of economic, social and cultural rights. The positions illustrated the different fundamentals of the two social systems. The Soviet-type system was ideologically rooted in Marxist thinking, and was characterised by state ownership of production and a thorough politicisation of all economic decisions. The Western system, on the other hand, adhered to liberal thinking, both economically and politically, and was based on private ownership of the means of production, with a state that could only indirectly influence the use of these means. The cold war rhetoric may have deluded people into thinking that the separation into two covenants was no more than a weapon to fight the cold war and that they should be integrated.

Whether or not to integrate the different types of right was also a major issue in the discussion in the legal profession. This discussion adopted a more historical approach, where civil and political rights were understood as eighteenth century, first generation rights, while economic and social rights belonged to the nineteenth century and were considered second generation rights. Whether or not these historical differences justify a separation of these rights is related to the role of the state in realising these rights. Civil and political rights are minimum rights that do not require an activist state and are cheap to realise. Economic, social and cultural rights depend on the level of development of a country and demand an activist state as well as a considerable financial effort. Mainstream legal thinking, however, seems to emphasise the difficulties in drawing such sharp dividing lines, and therefore argues in favour of an integrated approach.

The legalistic approach, however, ignores the importance of property rights to the means of production. Studies of Soviet-type countries have shown that state property of the means of production allows the state control over the use of these means but does not produce good economic results. In Western countries the state does not have the ownership of the means of production and, therefore, is unable to direct the means of production directly. With respect to a western type state, there is a distinction between state production and state organised income distribution. I have pointed out that the state can produce civil and political rights, but has to rely on income distribution to realise economic and social rights. The dividing line, therefore, is not so much the share of income that is used to realise all types of rights in an integrated fashion, but whether the right is produced by the state or not. The consequences of this distinction can be found in several directions. I will mention three. First, where the legalistic approach puts all state activities in the same category, I would argue that with respect to the realisation of economic and social rights the state is the platform of discussion, rather than the active, separate actor. Second, an attempt to embody economic and social rights in the law will probably be counterproductive in improving the economic and social situation of the people, as countries will minimise the commitments to which they can legally be bound. Finally, if economic and social rights are legally fixed, but unattainable, the credibility and trust in the state might be severely damaged.

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